

## Deposition of LAWRENCE J. LYNCH

7/29/11

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

=====

WISCONSIN RESOURCES PROTECTION  
COUNCIL, CENTER FOR BIOLOGICAL  
DIVERSITY and LAURA GAUGER,

Plaintiffs,

vs.

Case No. 11-CV-45

FLAMBEAU MINING COMPANY,  
Defendants.  
=====Deposition of:  
LAWRENCE J. LYNCH  
=====

Date: Friday, July 29, 2011

Time: 9:20 o'clock a.m.

Reported by NANCY L. DELANEY

## DEPOSITION of LAWRENCE J. LYNCH,

a witness of lawful age, taken on behalf of the  
plaintiffs in the above-entitled cause, wherein Wisconsin  
Resources Protection Council and others are the  
plaintiffs and Flambeau Mining Company is the defendant,  
pending in the District Court of the United States for  
the Western District of Wisconsin, pursuant to subpoena,  
before NANCY L. DELANEY, a Notary Public in and for the  
State of Wisconsin, at the offices of McGillivray,  
Westerberg & Bender, LLC, Attorneys at Law, 211 South  
Paterson Street, Madison, Wisconsin, on July 29, 2011,  
commencing at 9:20 o'clock a.m.

## APPEARANCES

JAMES N. SAUL and CHRISTA O. WESTERBERG,  
McGILLIVRAY, WESTERBERG & BENDER, LLC,  
Attorneys at Law, 211 South Paterson  
Street, Suite 320, Madison, Wisconsin,  
appearing on behalf of the plaintiffs;

TIMM P. SPEERSCHNEIDER,  
DeWITT, ROSS & STEVENS, S.C.,  
Attorneys at Law, 2 East Mifflin Street,  
Madison, Wisconsin, appearing on behalf of  
the defendant;

MARNEY HOFFER,  
STATE OF WISCONSIN DEPARTMENT OF NATURAL  
RESOURCES, BUREAU OF LEGAL SERVICES,  
101 South Webster Street, Madison,  
Wisconsin, appearing on behalf of the  
witness.

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## LAWRENCE J. LYNCH,

called as a witness, after being first  
duly sworn in the above cause, testified  
under oath as follows:

## EXAMINATION

BY MR. SAUL:

Q Good morning, Mr. Lynch.

A Good morning.

Q My name is Jamie Saul, I'm an attorney, I represent  
the plaintiffs in this civil lawsuit in Federal court,  
Wisconsin Resources Protection Council and others  
against Flambeau Mining Company. Will you please  
state and spell your name for the record?

A My name is Lawrence J. Lynch, L-a-w-r-e-n-c-e,  
L-y-n-c-h.

Q And have you been deposed or testified under oath  
before?

A I have testified, I've not been deposed.

Q What cases or proceedings were those?

A The Flambeau mine permitting process and also lawsuits  
related to the Flambeau mine, a party seeking  
temporary restraining orders and injunctions on  
construction.

Q I'll just go over a few simple guidelines to help the  
day go smoothly. If you would just do me a favor and

## Deposition of LAWRENCE J. LYNCH

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1 make sure that you understand the question before you  
2 answer it. If you begin answering a question, I'll  
3 assume that you understand the question. For the  
4 benefit of everyone in the room, we'll try not to talk  
5 over each other, so I'll try to let you finish  
6 speaking before I begin, and if you'll do the same.

7 Just please speak clearly and slowly for the  
8 benefit of the court reporter today and if you'll use  
9 verbal responses as opposed to, you know, nodding your  
10 head or other physical motions. We'll also spend some  
11 time, I'm sure, talking about some complex regulatory  
12 terms or phrases and I might pause you occasionally to  
13 ask you to explain or spell out some acronyms, just so  
14 it's clear and easy to understand.

15 I'm going to hand you what we'll mark as Exhibit  
16 1, it's already been entered as an exhibit in this  
17 case. Have you seen this document before?

18 (Exhibit 1 is marked for identification)

19 A No, I don't believe I have. I don't think so.

20 Q I'll represent --

21 A I think I've seen the attachment, but I don't believe  
22 I actually have seen the subpoena.

23 Q This is a subpoena served on the Wisconsin Department  
24 of Natural Resources under Rule 30(b)(6) of the  
25 Federal rules of Civil Procedure. It commands DNR to

7

1 A Yes.

2 Q And are you familiar with a feature on that  
3 industrial outlot that has been called the .9 acre  
4 biofilter?

5 A Yes.

6 Q And are you familiar with a stream called Stream C  
7 that flows across the property adjacent to the  
8 biofilter?

9 A Yes, I am.

10 (Exhibit 15 is marked for identification)

11 Q I'm handing you what has been labeled Exhibit 15, have  
12 you seen this document before?

13 A Yes, I have.

14 Q Can you tell me what it is?

15 A This is an affidavit that I had prepared indicating  
16 what my involvement was with the Flambeau mine  
17 project.

18 Q And that is your signature on page 11 of this  
19 document?

20 A Yes, it is.

21 Q Did you write this document yourself?

22 A I -- no, not completely.

23 Q Who wrote it?

24 A It was prepared by attorneys for Flambeau Mining  
25 Company based on discussions that we had.

6

1 designate persons who consent to testify on the  
2 Department's behalf about the matters that are  
3 presented in attachment A and the Department has  
4 provided you.

5 Are you aware that you're providing testimony  
6 today on the DNR's behalf?

7 A Yes.

8 Q And that your answers today will be taken as the  
9 Department's answers in this case?

10 A Yes.

11 Q Specifically, we'll be going over the issues presented  
12 in items 2 and 3 of attachment A. Is that your  
13 understanding as well?

14 A Yes.

15 Q In the course of your work for the DNR, have you  
16 become familiar with the Flambeau mine site near  
17 Ladysmith?

18 A Yes, I have.

19 Q Have you visited the site?

20 A Yes.

21 Q How many times have you visited?

22 A I don't know a precise number. If I had to guess,  
23 probably a hundred.

24 Q Are you familiar with a parcel of that property called  
25 the industrial outlot?

1 Q And --

2 A Trying to, again, document what my involvement was  
3 with the project.

4 Q Did you --

5 A I mean, I had direct input into it, in that there was,  
6 for instance, a draft of it and so I provided comments  
7 and revised previous drafts to reflect my true  
8 involvement.

9 Q Besides attorneys for the Flambeau Mining Company, did  
10 you consult with anyone else in preparing this  
11 document?

12 A Just our attorney, our program attorney, Dan Graff, at  
13 the time. He has since left the department.

14 Q And so at whose request did you prepare this  
15 affidavit?

16 A The Flambeau Mining Company.

17 Q Have you ever prepared and filed an affidavit other  
18 than this one in a Federal court proceeding?

19 A Federal court, no.

20 Q How about a State court proceeding?

21 A Well, again, with the permitting of the Flambeau mine,  
22 they weren't affidavits, but it was direct testimony,  
23 so very similar to this. I don't think I've done any  
24 other affidavits that I recall.

25 Q Have you ever prepared an affidavit prior to this one

9

1 in a case where the Department of Natural Resources  
2 was not a party?  
3 A No.  
4 Q And referring to paragraphs 3 and 4 of your affidavit  
5 which sort of address your role and your work for the  
6 Department of Natural Resources, have you ever worked  
7 for the DNR's Bureau of Watershed Management?  
8 A No.  
9 Q Have you ever been responsible for drafting and  
10 issuing permits under the WPDES program?  
11 A No.  
12 Q And I'll spell that out, it's the Wisconsin Pollutant  
13 Discharge Elimination System Program?  
14 A Right.  
15 Q Have you ever been responsible for drafting  
16 administrative code sections related to the WPDES  
17 program?  
18 A No.  
19 Q Have you ever worked with any other State or Federal  
20 agency?  
21 A Worked for them or with them?  
22 Q For them.  
23 A No. I'm sorry, I did, I worked for the U.S.  
24 Geological Survey while I was in graduate school.  
25 Q And you were not involved in developing NPDES permits?

11

1 124 of this document?  
2 A Yes.  
3 Q Did you draft any other portions of Exhibit 16?  
4 A Portions of the general findings of fact I drafted.  
5 Q So could you give me a page range using the WRPC page  
6 numbers, please, of the pages that you drafted?  
7 A It would be pages WRPC000085 through 111.  
8 Q Do you recall who drafted the WPDES permit?  
9 A I believe that was drafted by Priscilla Mather.  
10 Q Are you certain of that?  
11 A She was the person who testified at the hearing, so  
12 I'm assuming she was the person who drafted the  
13 permit, I believe.  
14 Q Would you please refer to paragraph 8 of your  
15 affidavit which is Exhibit 15 and you state in  
16 paragraph 8 that the key permit was the mining permit  
17 issued pursuant to section 144.85, Wisconsin statutes  
18 since renumbered 293.49, is that correct?  
19 A Yes.  
20 Q What do those statutory provisions refer to?  
21 A They are the section of the statutes related to  
22 issuance of a metallic mining permit.  
23 Q Do they relate to NPDES or WPDES permits?  
24 A No.  
25 Q You also state in paragraph 8 of your affidavit that

10

1 A No.  
2 (Exhibit 16 is marked for identification)  
3 Q Handing you what we've labeled as Exhibit 16, have you  
4 seen this document before?  
5 A Yes, I have.  
6 Q Can you tell me what it is, please.  
7 A This is the final decision document regarding issuance  
8 of the various permits for the Flambeau Mining Company  
9 project near Ladysmith.  
10 Q Is this the same document that you reference or that  
11 you included as Exhibit A in your affidavit?  
12 A Yes.  
13 Q And inside the front cover of Exhibit 16 which is page  
14 WRPC00026, do you see that a number of permits are  
15 identified on that page?  
16 A Yes.  
17 Q At least six different permits, is that correct?  
18 A Yes.  
19 Q And two of those permits are the mining permit and the  
20 WPDES permit, is that correct?  
21 A Yes, it is.  
22 Q And according to your affidavit, you drafted the  
23 mining permit?  
24 A Yes.  
25 Q So you drafted essentially what is pages 76 through

12

1 the mining permit provided the overall regulatory  
2 framework for the mine including provisions for  
3 stormwater management, is that correct?  
4 A Yes.  
5 Q What do you mean by the words stormwater management?  
6 A During construction and during operation as well,  
7 there's a provision in the mining permit that requires  
8 preparation of a surface water management plan and the  
9 surface water management plan governed how surface  
10 water on the site was handled, how it was routed,  
11 whether it went to a treatment facility, whether it  
12 went into off-site natural channels.  
13 Q Can you please identify the mining permit condition  
14 you're referring to that relates to stormwater  
15 management?  
16 A I thought it was in the reclamation plan approval, but  
17 it's not, so I have to look elsewhere.  
18 (Witness examines document)  
19 MS. HOEFER: If you have a specific  
20 section that you think it is, I think you can  
21 direct him to it.  
22 MR. SAUL: I don't, unfortunately.  
23 A Again, what I'm looking for is there's a condition  
24 that required preparation of a surface water  
25 management plan. I'm sure I'll find it in a moment.

1 (Witness examines document)  
 2 A It was in the reclamation section. Using the WRPC  
 3 numbering, page 142, condition 7 of the reclamation  
 4 plan approval refers to a surface water management  
 5 plan being submitted to the Department. It talks  
 6 about methods, materials and sequencing for erosion  
 7 control and drainage control for all portions of the  
 8 site during construction and at the time of  
 9 reclamation.  
 10 Q And so just to clarify, you read from part 3,  
 11 paragraph 7 of the mining permit, is that correct?  
 12 A Yes.  
 13 Q On WRPC000142?  
 14 A Yes.  
 15 Q Does that paragraph explicitly authorize a discharge  
 16 of pollutants to surface waters?  
 17 A No.  
 18 Q Are there any other provisions of the mining permit  
 19 that relate to stormwater management?  
 20 A Not directly, in the erosion -- again, this condition  
 21 talks about a supplement to the erosion control plan.  
 22 The erosion control plan also addressed various parts  
 23 of stormwater management, but the surface water  
 24 management plan when it was submitted was probably the  
 25 most comprehensive treatment of stormwater management

1 Q Does the DNR still agree with the statement made in  
 2 those first two sentences of paragraph 5?  
 3 A Yes.  
 4 Q Could you please turn to page WRPC000120 and I'll ask  
 5 you to read from -- I'll actually ask you to read the  
 6 entirety of part 2, paragraph 1 on that page which  
 7 continues on to the next page.  
 8 A "Approval granted herein is limited to the authority  
 9 vested in the department by sections 144.80 to 144.94  
 10 and 144.43 to 144.47, Stats. Facilities and  
 11 activities regulated under other permits, licenses and  
 12 approvals shall comply with all provisions of those  
 13 permits, licenses and approvals and the associated  
 14 statutes and administrative codes, except that  
 15 reclamation of the entire mining site shall be in  
 16 conformance with the approved reclamation plan."  
 17 Q Did you draft that provision of the permit?  
 18 A Yes.  
 19 Q And you've already covered this and I think they're  
 20 the same statutory citations, but what do those  
 21 statutory citations refer to?  
 22 A Again, sections 144.80 to 94 were the metallic mining  
 23 reclamation act that cover issuance of the mining  
 24 permit and approval of the mining plan and reclamation  
 25 plan and I'm not sure what 144.43 to 47 covered at

1 on the site.  
 2 Q Is there any other term or condition of the mining  
 3 permit that explicitly authorizes the discharge of  
 4 pollutants to surface waters?  
 5 A No.  
 6 Q If you could please turn to page WRPC000114 and if you  
 7 could please read from part 1, paragraph 5, the first  
 8 two sentences.  
 9 A "Permission granted herein is limited to the authority  
 10 vested in the Department by sections 144.80 to 144.94  
 11 and 144.43 to 144.47, Stats. Flambeau shall obtain  
 12 any and all other permits, licenses and approvals  
 13 necessary from Federal, State and local authorities."  
 14 Q Did you draft that provision of the mine permit?  
 15 A Yes.  
 16 Q What did those statutory references relate to?  
 17 A Again, sections 144.80 to 144.94 is the metallic  
 18 mining reclamation act. Sections 144.43 to 144.47,  
 19 I'm not sure offhand.  
 20 Q Do any of those statutory references refer to or  
 21 relate to the NPDES or WPDES permit program?  
 22 A Again, sections 144.80 to 94 do not and again, I don't  
 23 recall what sections 144.43 to 47 covered at that  
 24 time. They been renumbered, so I just don't recall  
 25 what sections those were.

1 that time.  
 2 Q And I'll ask you to turn to page WRPC000140 and again  
 3 read from part 3, paragraph 1 of the mine permit.  
 4 A "Approval granted herein is limited to the authority  
 5 vested in the Department by sections 144.80 to  
 6 144.94." Do you want the whole thing?  
 7 Q Yes, please.  
 8 A "Facilities and activities regulated under other  
 9 permits, licenses and approvals shall comply with all  
 10 provisions of those permits, licenses and approvals  
 11 and the associated statutes and administrative codes,  
 12 except that reclamation of the entire mine site shall  
 13 be in conformance with the approved reclamation plan."  
 14 Q And did you draft that permit provision?  
 15 A I did.  
 16 Q And I believe you've already stated that 144.80 to 94  
 17 relate to the metallic mining reclamation act and not  
 18 the WPDES permit program, is that correct?  
 19 A That's correct.  
 20 Q And does the Department still agree with that  
 21 statement?  
 22 A Yes.  
 23 Q Did Flambeau Mining Company disclose the .9 acre  
 24 biofilter as an outfall location for the discharge of  
 25 pollutants as part of its application for the mining



17	1 permit?	18	1 Q Is that the permit that's contained on pages
	2 A No, it did not.		2 WRPC000151 to 182, Exhibit 16?
	3 Q Do you know why that was?		3 A Yes.
	4 A Under the original reclamation plan that was approved,		4 Q Did you draft the WPDES permit?
	5 the entire mining site would be reclaimed, facilities		5 A I did not.
	6 would be removed and that would not have been a .9		6 Q I'll ask you to read paragraph 49 on page WRPC000151,
	7 acre biofilter under the original plan.		7 please.
	8 Q Did Flambeau Mining Company inform the Department that		8 A "The discharges to surface waters regulated by the
	9 copper and zinc would be contained in the waste stream		9 WPDES permit will consist of stormwater runoff for
	10 discharged from the .9 acre biofilter as part of its		10 most of the mining site, leachate from the Type II
	11 application for the '91 mining permit?		11 stockpile and ground water seeping into the pit. Two
	12 A No.		12 types of wastewater are expected, depending on the
	13 Q And did the Department evaluate the potential water		13 composition of the rock with which the water has been
	14 quality impact from the discharge of copper and zinc		14 in contact."
	15 from the biofilter to Stream C in the Flambeau River		15 Q Does the Department agree with that statement today?
	16 as part of its issuance of the 1991 mining permit?		16 A Yes.
	17 A No.		17 Q Is it accurate to say that when both the 1991 mining
	18 Q Was the 1991 mining permit issued under authority of		18 permit and the 1991 WPDES permit were issued,
	19 section 402 of the Federal Clean Water Act?		19 stormwater discharges to surface waters were regulated
	20 A The mining permit?		20 by the 1991 WPDES permit?
	21 Q Yes.		21 A Yes.
	22 A No.		22 Q I'll ask you to refer to paragraphs 9 and 10 of your
	23 Q And concurrently with the issuance of the 1991 mining		23 affidavit, Exhibit 15. And just to clarify, the 1991
	24 permit, a WPDES permit was issued, is that correct?		24 WPDES permit authorized the discharge of stormwater
	25 A Yes.		25 from the mine site through three specifically
19	1 identified outfalls, is that correct?	20	1 A No, the biofilter did not exist.
	2 A That's right.		2 (Exhibit 17 is marked for identification)
	3 Q Did the 1991 mining permit also include any		3 Q Handing you what we've marked as Exhibit 17, do you
	4 authorization for the discharge of stormwater from the		4 recognize this document?
	5 mine site through these specific outfalls?		5 A I do.
	6 A No.		6 Q Can you tell me what it is, please.
	7 Q During the time when the WPDES permit was in effect,		7 A Well, I certainly -- it appears to be a figure from
	8 stormwater runoff from the area that we now identify		8 our environmental impact statement.
	9 as the industrial outlot was directed to the waste		9 Q It appears to be?
	10 water treatment plants and subsequently discharged to		10 A Well, it's not labeled what it is, but I mean, it
	11 the Flambeau River through outfall 001, is that		11 looks like something that would have been in our
	12 correct?		12 environmental impact statement.
	13 A That's right.		13 Q And I'll represent to you that it's my understanding
	14 Q Did the 1991 WPDES permit include effluent limitations		14 as well that this is figure 1-3 from the environmental
	15 applicable to stormwater runoff discharge to outfall		15 impact statement.
	16 001 for the pollutants copper and zinc?		16 A Okay.
	17 A Yes. Well, copper, yes, let me check zinc. I assume		17 Q Could you please compare this diagram, specifically
	18 so, but let me check the permit. Again, that wasn't a		18 the two outfalls that are identified in paragraphs 9
	19 permit that I drafted, so I don't know. Yes.		19 and 10 of your affidavit, as well as the 1991 WPDES
	20 Q And did the mining permit also include effluent		20 permit which is --
	21 limitations for copper and zinc?		21 MS. HOEFER: Objection, it's a
	22 A No.		22 compound question.
	23 Q When the 1991 mining permit was issued, was the DNR		23 Q So the question is, are those two outfalls identified
	24 aware that there was a discharge from the biofilter to		24 on Exhibit 17 the same as the outfalls that you
	25 Stream C?		25 reference in paragraphs 9 and 10 of your affidavit?

21  
 1 A Outfalls 1 and 2 are indicated on Exhibit 17, outfall  
 2 1 is the southernmost outfall shown on figure 1-3.  
 3 002 is the other one.  
 4 Q And are those two outfalls identified on Exhibit 17  
 5 the same as outfalls 1 and 2 that are identified in  
 6 the 1991 mining permit?  
 7 A The mining permit or WPDES permit?  
 8 Q Excuse me, WPDES permit.  
 9 A Yes.  
 10 Q I just want to make sure we're talking about the same  
 11 outfalls throughout. There was an outfall 003, but  
 12 that's not indicated on or labeled on Exhibit 17, is  
 13 that correct?  
 14 A Correct.  
 15 Q And was outfall 003 essentially the same waste stream  
 16 as outfall 002, but just discharged to wetlands?  
 17 A Yes.  
 18 Q So outfall 002 and 003 were both north of the mine  
 19 pit?  
 20 A Yes, northwest.  
 21 Q So I just want to summarize and make sure I'm fully  
 22 understanding your testimony. The 1991 mining permit  
 23 was issued under authority of chapter 144 of the  
 24 Wisconsin statutes, correct?  
 25 A That's right.

23  
 1 A Yes.  
 2 Q And this Exhibit 18 which I'll call the 1996 WPDES  
 3 permit identifies several outfalls, is that correct?  
 4 A Yes.  
 5 Q And specifically, I'm looking at WRPC000231 and that  
 6 page identifies an outfall 001 and an outfall 002, is  
 7 that correct?  
 8 A In addition to 003 and 004, yes.  
 9 Q Are the outfalls 001 and 002 in the 1996 WPDES permit  
 10 the same as outfalls 001 and 002 in the 1991 WPDES  
 11 permit?  
 12 A Yes.  
 13 Q Which again, those are the same outfalls that you  
 14 referred to in paragraphs 9 and 10 of your affidavit,  
 15 correct?  
 16 A Yes.  
 17 Q Was this 1996 WPDES permit used by the Department to  
 18 authorize and regulate the discharge of stormwater  
 19 from the Flambeau mine site to the Flambeau River?  
 20 A Yes.  
 21 Q Could you please read on -- it's the first page of  
 22 Exhibit 18, WRPC000224, the second paragraph down,  
 23 beginning with, "The attached WPDES permit."  
 24 A "The attached WPDES permit covers the discharge from  
 25 the facility located at N1400 Highway 27 in Ladysmith,

22  
 1 Q And the 1991 mining permit was not issued under  
 2 authority of the WPDES permit program, is that  
 3 correct?  
 4 A That's right.  
 5 Q And the 1991 mining permit was not issued under  
 6 section 402 of the Clean Water Act, is that correct?  
 7 A That's correct.  
 8 Q And the .9 acre biofilter discharge to Stream C in the  
 9 Flambeau River was not regulated or discussed in the  
 10 1991 mining permit, correct?  
 11 A That's right.  
 12 Q But concurrently with issuance of the 1991 mining  
 13 permit, there was the WPDES permit that did cover  
 14 stormwater discharges from the site?  
 15 A That's right.  
 16 (Exhibit 18 is marked for identification)  
 17 Q Handing you what we've marked as Exhibit 18, do you  
 18 recognize this document?  
 19 A Yes.  
 20 Q Can you tell me what it is, please.  
 21 A This is a WPDES permit issued to Flambeau Mining  
 22 Company, I believe it was a revised permit from --  
 23 yeah, from 1996.  
 24 Q Is this the same WPDES permit that's referenced in  
 25 paragraph 13 of your affidavit?

4  
 1 Wisconsin into the Flambeau River. All discharges  
 2 from this facility and actions or reports relating  
 3 thereto shall be in accordance with the terms and  
 4 conditions of this permit."  
 5 Q And when this 1996 WPDES permit was issued, did the  
 6 DNR make any changes to the mining permit?  
 7 A Not that I know of, no.  
 8 Q So as of the date of issuance, March 29, 1996,  
 9 stormwater discharges to surface waters from the  
 10 Flambeau mine site were regulated by the 1996 WPDES  
 11 permit?  
 12 A Yes.  
 13 Q And not by the 1991 mining permit?  
 14 A That's correct.  
 15 Q Would you please read from page WRPC000227, the  
 16 paragraph beginning with, "The permittee shall."  
 17 A "The permittee shall not discharge after the date of  
 18 expiration. If the permittee wishes to continue to  
 19 discharge after this expiration date, an application  
 20 shall be filed for reissuance of this permit in  
 21 accordance with the requirements of chapter NR 200,  
 22 Wisconsin Administrative Code, at least 180 days prior  
 23 to this expiration date."  
 24 (Exhibit 19 is marked for identification)  
 25 Q I'm handing you what we've labeled as Exhibit 19, do

<p>1 you recognize this document?</p> <p>2 A Yes.</p> <p>3 Q Is this the same document as the January 8, 1998</p> <p>4 request for modification of the mining permit that you</p> <p>5 reference in paragraph 15 of your affidavit?</p> <p>6 A Yes.</p> <p>7 Q Was this the first time that Flambeau Mining Company</p> <p>8 applied for a modification to its mining permit?</p> <p>9 A No.</p> <p>10 Q When else did they apply for modification to the</p> <p>11 mining permit?</p> <p>12 A I don't recall the exact dates, but during the</p> <p>13 operation, they modified their production rate to</p> <p>14 basically mine the ore body out faster than what was</p> <p>15 originally planned, so that was one previous</p> <p>16 modification that I recall.</p> <p>17 Q Was that previous modification prior to January 8,</p> <p>18 1998?</p> <p>19 A Yes.</p> <p>20 Q Do you know approximately when that was?</p> <p>21 A 1994 or '95, somewhere in that range.</p> <p>22 Q Were there any other requests to modify the mining</p> <p>23 permit that you're aware of?</p> <p>24 A Not that I can think of, but there may have been</p> <p>25 minor -- there may have been minor modifications. The</p>	25	<p>1 mining permit allowed certain deviations from the</p> <p>2 planned construction and so if they were going to, for</p> <p>3 instance, move a facility 100 feet or 200 feet, it may</p> <p>4 have required a modification, so there may have been</p> <p>5 minor changes like that, I mean, throughout the</p> <p>6 project.</p> <p>7 Q Was the 1994 or '95 modification that you referred to</p> <p>8 earlier, was that granted by the DNR?</p> <p>9 A Yes.</p> <p>10 Q Who at the DNR would know with precision about the</p> <p>11 other modifications?</p> <p>12 A Probably nobody other than me, I mean, I could</p> <p>13 determine it if I went back through the records. I</p> <p>14 believe the company -- well, I know the company in</p> <p>15 their annual reports that were required to be</p> <p>16 submitted had to summarize each year any</p> <p>17 modifications, so it would be relatively easy to go</p> <p>18 back through their annual reports and determine what</p> <p>19 modifications were issued in that preceding year.</p> <p>20 That's how I would do it if I had to.</p> <p>21 Q When the Flambeau Mining Company requested a</p> <p>22 modification to the mining permit in January of 1998,</p> <p>23 did they also request a modification to their WPDES</p> <p>24 permit?</p> <p>25 A Not that I'm aware of.</p>	26
<p>1 Q Did they submit an application for coverage under any</p> <p>2 general or individual stormwater discharge WPDES</p> <p>3 permits?</p> <p>4 A Again, not that I'm aware of.</p> <p>5 Q Do you know who would be aware of that?</p> <p>6 A Somebody in the wastewater program, again, at the</p> <p>7 time, somebody like Jim Hansen from our regional</p> <p>8 office, Tom Bauman from our central office and people</p> <p>9 who worked there that have since retired.</p> <p>10 Q The January 8, 1998 letter states that the request for</p> <p>11 modification was submitted in accordance with</p> <p>12 conditions 2 and 3 of part 3 of the mining permit, is</p> <p>13 that correct?</p> <p>14 A That's correct.</p> <p>15 Q Will you please refer to conditions 2 and 3 in part 3</p> <p>16 of the mining permit.</p> <p>17 A Do you have a page number?</p> <p>18 Q I think it's WRPC000140.</p> <p>19 A Did you ask me to read those or just refer to them?</p> <p>20 Q No, would you please read the first sentence of part</p> <p>21 3, condition 3 of the mine permit.</p> <p>22 A "If Flambeau desires to modify a facility or activity</p> <p>23 regulated under another authority, the modification</p> <p>24 shall be processed pursuant to the provisions of the</p> <p>25 appropriate authority."</p>	27	<p>1 Q Were the discharges of stormwater under the 1991 and</p> <p>2 the 1996 WPDES permits considered to be activities</p> <p>3 regulated under another authority?</p> <p>4 A Yes.</p> <p>5 Q And referring back to the first page of Exhibit 19,</p> <p>6 this letter also states that the request for</p> <p>7 modification to the mining permit was submitted in</p> <p>8 accordance with NR 132.13(3)(a), is that correct?</p> <p>9 A Yes.</p> <p>10 Q What does that citation refer to?</p> <p>11 A I don't have the code in front of me, so I don't have</p> <p>12 it memorized. My guess is it's the section of the</p> <p>13 code related to modifications, but I don't know that.</p> <p>14 Q Modifications of the mining permit?</p> <p>15 A Of the mining permit.</p> <p>16 Q Does that regulatory citation refer to or relate to</p> <p>17 WPDES permits?</p> <p>18 A No.</p> <p>19 Q Does anything in this letter that is Exhibit 19</p> <p>20 mention the .9 acre biofilter?</p> <p>21 A Yes.</p> <p>22 Q Can you please read the sentence that refers to the</p> <p>23 biofilter?</p> <p>24 A Again, I'm reading from the first page, about in the</p> <p>25 middle of the section labeled land use and reclaimed</p>	28

1 area. "Ancillary facilities would be retained which  
2 would include the administration building, maintenance  
3 shop foundation, wastewater treatment plant, fire  
4 water tank, potable water well, utilities, railroad  
5 spur not underlain with HPDE (east and west of State  
6 Highway 27), access road, culverts and piping draining  
7 stormwater to the former surge pond, former surge pond  
8 liner as part of a stormwater biofilter system  
9 underground piping associated with WWTP, culverts  
10 associated with intermittent Stream C and security  
11 fencing."

12 Q And WWTP in that sentence means wastewater treatment  
13 plant?

14 A Yes.

15 Q Does anything in this letter indicate that the .9 acre  
16 biofilter would discharge copper and zinc to Stream C  
17 or to the Flambeau?

18 A No.

19 Q Is this letter, Exhibit 19, an application for a WPDES  
20 permit?

21 A No.

22 (Exhibit 20 is marked for identification)

23 Q Handing you what we've labeled as Exhibit 20, do you  
24 recognize this document?

25 A Yes.

1 diagram that is Exhibit 17?

2 A It's basically the area just northwest of the southern  
3 end of the pit. If you see that in the area with the  
4 curve jutting out of the fenced area, that's the area  
5 where hydric soil was stored during operation, so they  
6 converted the hydric soil storage area along with part  
7 of the southern end of the pit into a larger  
8 biofilter.

9 Q So that biofilter was immediately north of the mine  
10 pit and adjacent to the Flambeau River?

11 A Yes.

12 Q Now I'm going to ask you to refer to paragraph 19 of  
13 your affidavit.

14 A Okay.

15 Q Your affidavit states that the discharge from the  
16 industrial outlot biofilter would fall under the  
17 regulatory authority of the mining permit, is that  
18 correct?

19 A Yes.

20 Q Which provisions or terms or conditions of the mining  
21 permit were you referring to in paragraph 19 of your  
22 affidavit?

23 A Really, it's the approval of the modification and the  
24 ongoing implementation of the surface water management  
25 plan and erosion control plan.

1 Q Can you tell me what it is?

2 A This is a letter that I wrote to Jana Murphy from  
3 Flambeau Mining Company.

4 Q And is this the same document that you included as  
5 Exhibit B to your affidavit?

6 A Yes.

7 Q And at the time this letter was sent on March 20,  
8 1998, was the 1996 WPDES permit still in place?

9 A Yes.

10 Q So as of March 20, 1998, stormwater discharges from  
11 the mine site were still authorized and regulated by  
12 that 1996 WPDES permit, correct?

13 A Yes.

14 Q Now, on page 1 of Exhibit 20, there's a reference to a  
15 permanent biofilter with an engineered outflow through  
16 outfall 002, is that the same biofilter as the .9 acre  
17 biofilter on the industrial outlot?

18 A No.

19 Q What is the biofilter referred to in Exhibit 20?

20 A That's a larger created wetland biofilter which was in  
21 the area of the former wetland soil stockpile.

22 Q So do you have Exhibit 17 in front of you?

23 A Yes.

24 Q Can you describe for me as best you can the location  
25 of the biofilter referred to in Exhibit 20 on the

1 Q Your March 20, 1998 letter which is Exhibit 20, was  
2 that sent before -- let me rephrase. Was the Flambeau  
3 Mining Company's request to modify their mining permit  
4 approved as of that date?

5 A I can check. I don't -- let me check.

6 (Witness examines documents)

7 A The approval of the modification was issued July 30 of  
8 1998, so no, it wasn't.

9 Q And can you tell me what documents you've just looked  
10 at?

11 A A letter that I wrote to Flambeau Mining Company on  
12 July 30, 1998 about modification approval.

13 Q Thank you. So will you please read the last two  
14 sentences of the third paragraph on Exhibit 20,  
15 beginning with, "Once all permanent."

16 A "Once all permanent water management structures and  
17 facilities are in place and pumping is no longer  
18 necessary, discharges through outfall 002 will cease  
19 to be covered under the WPDES permit. At that time  
20 stormwater management will fall under the regulatory  
21 authority of the mining permit and its associated  
22 plans."

23 Q In that last sentence, the word discharge is not used,  
24 correct?

25 A Correct.



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1 Q And in paragraph 19 of your affidavit, you do refer to  
2 discharge from the industrial outlot biofilter,  
3 correct?  
4 A Correct.  
5 Q Is there a reason why you did not use the word  
6 discharge in Exhibit 20?  
7 A No, we were just referring to the overall management  
8 of stormwater on site.  
9 Q And the regulatory authority of the mining permit that  
10 paragraph 19 of your affidavit refers to, you  
11 mentioned that it sort of relates to the overall  
12 authority granted under the proposed modification?  
13 A Under the -- well, the modification provided the  
14 details of how the site would be reclaimed, so it went  
15 into the grading plan, so it more or less dictated how  
16 surface water would move on the site and part of the  
17 grading plan and part of the modification was  
18 construction of the biofilters and other erosion  
19 control measures, so that's really what it's referring  
20 to.  
21 Q And earlier in this deposition today, I asked you to  
22 read from part 3, paragraph 1 of the mining permit  
23 which I'll just go ahead and read again. "Approval  
24 granted herein is limited to the authority vested in  
25 the Department by sections 144.80 to 144.94, Stats."

35

1 correct.  
2 Q Is it the DNR's contention that this letter is a  
3 permit issued under section 402 of the Clean Water  
4 Act?  
5 A No.  
6 (Exhibit 21 is marked for identification)  
7 Q I'm handing you what we've labeled as Exhibit 21, do  
8 you recognize this document?  
9 A I do.  
10 Q Can you tell me what it is?  
11 A This is a letter from me to Jeff Earnshaw of the  
12 Flambeau Mining Company issuing the approval for the  
13 modification of the reclamation plan mining permit.  
14 Q And is this the same document that you included as  
15 Exhibit G to your affidavit?  
16 A Exhibit G was the actual -- yeah, I mean, this is the  
17 modification issuance, so I guess that is it, yes.  
18 Q And is this Exhibit 21 the same document that you  
19 referred to earlier that you brought with you?  
20 A Yes.  
21 Q Is there any mention of the 0.9 acre biofilter in this  
22 approval document?  
23 (Witness examines document)  
24 A Not specifically.  
25 Q Does anything in this document that is Exhibit 21

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1 Was that provision of the 1991 mining permit  
2 modified as of the time you wrote your March 20, 1998  
3 letter?  
4 A No.  
5 Q And you agreed with me earlier that the Department --  
6 you stated earlier that the Department agreed that the  
7 approvals granted under the mining permit were limited  
8 in that fashion, correct?  
9 A Yes.  
10 Q Prior to the date of your letter as Exhibit 20 which  
11 was March 20, 1998, did Flambeau Mining Company inform  
12 DNR that it would discharge copper and zinc from the  
13 biofilter to Stream C?  
14 A No.  
15 Q Prior to the date of that letter, did DNR analyze the  
16 potential water quality impacts from the discharge of  
17 copper and zinc from the .9 acre biofilter?  
18 A No.  
19 Q Does this letter authorize a discharge of copper and  
20 zinc from the .9 acre biofilter to Stream C or the  
21 Flambeau River?  
22 A No, it authorizes construction of the biofilter and  
23 management of the site.  
24 Q The letter authorizes that?  
25 A I'm sorry, no, this letter does not, I'm sorry, you're

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1 authorize Flambeau Mining Company to discharge  
2 pollutants to surface waters?  
3 A No.  
4 Q At the time this mining permit modification was  
5 approved, which was July 30, 1998, the 1996 WPDES  
6 permit was still in effect, correct?  
7 A Yes, I believe so.  
8 Q So all stormwater discharges from the mine site were  
9 still authorized and regulated by that 1996 WPDES  
10 permit as of this time?  
11 A Again, I believe so. I think you'll probably have  
12 another exhibit that addresses that, but let me check.  
13 Q Could you please refer to -- I'm sorry.  
14 A Yes, that's correct.  
15 Q And what did you just refer to?  
16 A Again, a letter from me written to Jana Murphy from  
17 Flambeau Mining Company dated September 8, 1998  
18 indicating that the WPDES permit was no longer in  
19 force.  
20 Q Would you mind please identifying the documents that  
21 you brought with you today for the record?  
22 A I believe they're copies of the exhibits with my  
23 affidavit.  
24 Q Is there anything that you brought with you that's not  
25 an exhibit to your affidavit?

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1 A No.  
 2 Q Could you please turn to page WRPC000259 on Exhibit  
 3 21?  
 4 A Yes.  
 5 Q And under the heading conclusions of law, there are  
 6 three paragraphs, correct?  
 7 A Yes.  
 8 Q And three different statutory citations are provided,  
 9 correct?  
 10 A That's right.  
 11 Q One in each paragraph?  
 12 A Yes.  
 13 Q The statutory citation in the first paragraph, 293.55,  
 14 what does that relate to?  
 15 A Again, I don't have the statutory sections memorized,  
 16 but my assumption is that it relates to issuance of  
 17 modifications of reclamation plans, mining plans and  
 18 mining permits.  
 19 Q And what about the citation in paragraph 2, do you  
 20 know what that refers to?  
 21 A Again, that is part of the modification section  
 22 indicating what process we're to follow in determining  
 23 that changes were substantial or not.  
 24 Q And the citation in paragraph 3?  
 25 A Again, part of the modification section, authorizing

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1 Q Did part 1, condition 5 of the mining permit remain in  
 2 full force and effect when the July 30, 1998 mining  
 3 permit modification was issued? And that's  
 4 WRPC000114.  
 5 A Yes.  
 6 Q So that provision limits the authority under the  
 7 mining permit to sections 144.80 to 144.94 and 144.43  
 8 to 144.47, correct?  
 9 A Yes.  
 10 Q As part of its request for the 1998 mining permit  
 11 modification, did Flambeau Mining Company inform DNR  
 12 that copper and zinc would be contained in the waste  
 13 stream discharged from the .9 acre biofilter?  
 14 A No.  
 15 Q Did DNR evaluate the potential water quality impacts  
 16 from the discharge of copper and zinc from the .9 acre  
 17 biofilter to Stream C as part of issuing the 1998  
 18 mining permit modification?  
 19 A No.  
 20 Q Is the 1998 mining permit modification, which again is  
 21 Exhibit 21, is that a permit issued under section 402  
 22 of the Clean Water Act?  
 23 A No.  
 24 MR. SPEERSCHNEIDER: I would have  
 25 objected to the form, but go on.

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1 the Department to issue a modification without public  
 2 hearing.  
 3 Q Do any of those citations refer to the WPDES permit  
 4 program?  
 5 A No.  
 6 Q Are there any conclusions of law in this document that  
 7 relate to the WPDES permit program?  
 8 A No.  
 9 Q Are there any conclusions of law that relate to the  
 10 Federal Clean Water Act?  
 11 A No.  
 12 Q I'll ask you to read the first two sentences under the  
 13 heading mining permit modification on page  
 14 WRPC000259.  
 15 A "Flambeau Mining Company is hereby issued a  
 16 modification under section 293.55, Stats., to its  
 17 mining permit for its mining operation in Rusk County.  
 18 Q And the next sentence?  
 19 A "All other provisions of the mining permit remain in  
 20 full force."  
 21 Q And I believe you mentioned earlier section 293.55  
 22 relates to the metallic mining law?  
 23 A Yes.  
 24 Q And not the WPDES permit program?  
 25 A That's correct.

40

1 Q Was the U.S. Environmental Protection Agency provided  
 2 with a copy of the mining permit modification?  
 3 A No.  
 4 Q Was there ever a contested case hearing concerning the  
 5 1998 mining permit modification?  
 6 A No.  
 7 Q Was there ever civil litigation in either State or  
 8 Federal court regarding the 1998 mining permit  
 9 modification?  
 10 A No.  
 11 Q Had the .9 acre biofilter been constructed by the time  
 12 Flambeau Mining Company's request for a mining permit  
 13 modification was granted?  
 14 A There was a facility there, but it wasn't the  
 15 biofilter, it was the surge pond.  
 16 Q At that time, was the surge pond discharging directly  
 17 to Stream C or the Flambeau River?  
 18 A Water in the surge pond was directed to the treatment  
 19 plant and then to the river.  
 20 Q To the Flambeau River?  
 21 A Yes.  
 22 Q Was it discharged via one of the outfalls covered  
 23 under the --  
 24 A Yes, outfall 001.  
 25 Q Covered under the 1996 WPDES permit?

<p>1 A Yes.</p> <p>2 Q Was DNR aware at the time that the 1998 mining permit</p> <p>3 modification was granted that Flambeau Mining Company</p> <p>4 was discharging concentrations of copper and zinc from</p> <p>5 the biofilter to Stream C at levels that exceeded</p> <p>6 acute toxicity criteria?</p> <p>7 A At the time this -- I'm sorry, can you repeat the --</p> <p>8 at the time the modification was issued?</p> <p>9 Q Yes.</p> <p>10 A Again, the biofilter didn't exist at that time.</p> <p>11 (Exhibit 22 is marked for identification)</p> <p>12 Q I'm handing you what we've labeled as Exhibit 22, do</p> <p>13 you recognize this document?</p> <p>14 A Yes.</p> <p>15 Q Can you tell me what it is, please.</p> <p>16 A Again, it's a letter from me to Jana Murphy of</p> <p>17 Flambeau Mining Company indicating that the discharge</p> <p>18 through outfall 002 at the Flambeau mining site was no</p> <p>19 longer subject to the WPDES permit and that it would</p> <p>20 be regulated under the mining permit.</p> <p>21 Q Is this the same as the document included as Exhibit H</p> <p>22 to your affidavit?</p> <p>23 A Yes.</p> <p>24 Q Now, this letter, Exhibit 22, explicitly mentions</p> <p>25 outfall 002. Is that the same outfall 002 that's</p>	<p>41</p> <p>1 identified in both the 1991 and the 1996 WPDES</p> <p>2 permits?</p> <p>3 A Yes.</p> <p>4 Q And this letter does not explicitly mention the .9</p> <p>5 acre biofilter, correct?</p> <p>6 A Correct.</p> <p>7 Q Does this letter authorize the discharge of pollutants</p> <p>8 from the .9 acre biofilter to Stream C or the Flambeau</p> <p>9 River?</p> <p>10 A No.</p> <p>11 Q And at the time this letter was sent, September 8,</p> <p>12 1998, the 1996 WPDES permit was still in effect,</p> <p>13 correct?</p> <p>14 A Yes.</p> <p>15 Q So stormwater discharges from the Flambeau mine site</p> <p>16 continued to be authorized and regulated under that</p> <p>17 1996 WPDES permit?</p> <p>18 A Well, this letter is indicating that the discharge</p> <p>19 through outfall 002 was no longer being regulated</p> <p>20 under the WPDES permit, that's the intent of this</p> <p>21 letter.</p> <p>22 Q But the remainder of the 1996 WPDES permit was still</p> <p>23 in full force and effect?</p> <p>24 A To the extent the outfalls existed, but outfall 001 no</p> <p>25 longer existed and we're indicated, again, the</p> <p>42</p>
<p>43</p> <p>1 discharges through 002 were covered under the mining</p> <p>2 permit.</p> <p>3 Q Prior to the date of this letter, September 8, 1998,</p> <p>4 did Flambeau Mining Company inform DNR that it would</p> <p>5 discharge copper and zinc from the .9 acre biofilter</p> <p>6 to Stream C?</p> <p>7 A No.</p> <p>8 Q Prior to the date of this letter, did DNR analyze the</p> <p>9 potential water quality impacts from the discharge of</p> <p>10 copper and zinc from the .9 acre biofilter to either</p> <p>11 Stream C or the Flambeau River?</p> <p>12 A No.</p> <p>13 Q And why not?</p> <p>14 A The biofilter was intended to collect water from the</p> <p>15 reclaimed part of the mining site, basically</p> <p>16 overburdened soil and non contact, overburdened, so it</p> <p>17 wasn't believed to present or have any threat. It</p> <p>18 was, again, considered to be more clean stormwater.</p> <p>19 Q Was the September 8, 1998 letter which is Exhibit 22</p> <p>20 subject to public notice and comment opportunities?</p> <p>21 A No.</p> <p>22 Q Was it sent to anyone else other than the addressee</p> <p>23 and the four persons who were copied on the letter?</p> <p>24 A I don't believe so.</p> <p>25 Q Was the USEPA provided with a copy of this letter?</p>	<p>44</p> <p>1 A No.</p> <p>2 Q Is this letter a permit issued under section 402 of</p> <p>3 the Clean Water Act?</p> <p>4 A No.</p> <p>5 (Exhibit 23 is marked for identification)</p> <p>6 Q I'm handing you what we've marked as Exhibit 23, do</p> <p>7 you recognize this document?</p> <p>8 A Yes.</p> <p>9 Q Can you tell me what it is, please.</p> <p>10 A This is a letter from Paul Luebke from our Bureau of</p> <p>11 Watershed Management to Flambeau Mining Company</p> <p>12 indicating that that program was basically closing out</p> <p>13 the WPDES permit issued to Flambeau Mining Company.</p> <p>14 Q Is this the same document that you included as Exhibit</p> <p>15 I to your affidavit?</p> <p>16 A Yes.</p> <p>17 Q So this letter essentially terminated permit coverage</p> <p>18 under the 1996 WPDES permit?</p> <p>19 A Yes.</p> <p>20 Q Effective September 23, 1998?</p> <p>21 A The way I'm reading it, it doesn't give a specific</p> <p>22 date, in that they allow the company 15 days to -- if</p> <p>23 they disagree with that determination, so I don't</p> <p>24 think it's -- it doesn't clearly state that the permit</p> <p>25 was closed out as of September 23, 1998.</p>

## Deposition of LAWRENCE J. LYNCH

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1 Q Fair enough. Do you know if there was an official --  
 2 if the Department has determined that there was an  
 3 official determination date of the 1996 WPDES permit?  
 4 A I don't know that.  
 5 Q Do you know who at the DNR would know that?  
 6 A Again, my first thought would be Paul Luebke.  
 7 Q So at least up to September 23, 1998, stormwater  
 8 discharges from the Flambeau mine site were authorized  
 9 and regulated by that 1996 WPDES permit, is that  
 10 correct?  
 11 A They were, but with the previous exhibit, Exhibit 22,  
 12 we indicated that discharges through outfall 002 were  
 13 as of September 8, 1998 covered under the mining  
 14 permit.  
 15 Q And the outfall 002 is the same as outfall 002  
 16 identified in both the 1991 and the 1996 WPDES  
 17 permits?  
 18 A Yes.  
 19 Q And the same as the outfall 002 that we previously  
 20 identified on the diagram that's Exhibit 17?  
 21 A Yes.  
 22 Q Now, this letter mentions a biofilter overflow  
 23 associated with outfall 002?  
 24 A Yes.  
 25 Q Is that the same as the .9 acre biofilter on the

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1 Q Who could answer that question?  
 2 A Somebody in the watershed program.  
 3 Q Could Paul Luebke answer that question?  
 4 A I would -- again, he would be a first option.  
 5 Q Now, again, I want to make sure I'm understanding your  
 6 testimony today. Both the 1991 mining permit and the  
 7 1998 mining permit modification were issued under  
 8 state law, the metallic mining law at chapter 144 of  
 9 the statutes, correct?  
 10 A Yes.  
 11 Q And neither the '91 mining permit or the '98 mining  
 12 permit modification were issued under section 402 of  
 13 the Clean Water Act?  
 14 MR. SPEERSCHNEIDER: Again, I'll  
 15 just object to the form. I don't think he's  
 16 qualified to answer, but you're not my witness, so  
 17 go ahead.  
 18 A Yeah, I mean, the original permit was issued under --  
 19 the mining permit was issued under the metallic mining  
 20 reclamation act which at the time was 144, 144 of the  
 21 statutes. The modification was again issued under the  
 22 same authority, but at that time, it was renumbered to  
 23 chapter 293 of the statutes.  
 24 Q And again, the stormwater discharges from the Flambeau  
 25 mine site were authorized and regulated by the 1991

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1 industrial outlot?  
 2 A No.  
 3 Q That's the larger biofilter that's to the north of the  
 4 mining permit?  
 5 A That's correct.  
 6 Q Or excuse me, the mine pit?  
 7 A Correct.  
 8 Q Can you please read the first sentence of the third  
 9 paragraph of this exhibit.  
 10 A "A significant change in the operations or discharge  
 11 described, or any changes in applicable Wisconsin  
 12 statutes or administrative codes may, however, require  
 13 that a permit be obtained in the future."  
 14 Q Does the Department agree with that statement?  
 15 A This isn't -- this wasn't part of my program, so I --  
 16 Q So you can't answer?  
 17 A I can't answer.  
 18 Q Who could answer that question?  
 19 A Again, Paul Luebke from the Bureau of Watershed  
 20 Management would be a reasonable first choice.  
 21 Q Would the Department think that a discharge of copper  
 22 or zinc in excess of applicable water quality criteria  
 23 would be a significant change in operations or  
 24 discharge described?  
 25 A Again, that's not part of my program.

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1 WPDES permit and subsequently by the 1996 WPDES  
 2 permit, correct?  
 3 A Yes.  
 4 Q And those stormwater discharges were authorized and  
 5 regulated by the 1996 WPDES permit up until the date  
 6 that permit was terminated?  
 7 A Again, the discharge out of 002 as of September 8,  
 8 1998 was regulated under the WPDES permit. On  
 9 september 8, 1998 we indicated that that discharge was  
 10 regulated under the mining permit.  
 11 Q Has the Flambeau Mining Company held a WPDES permit  
 12 since September 23, 1998?  
 13 A Not that I know of.  
 14 Q Who would know?  
 15 A Again, staff in our watershed program. I don't  
 16 believe they have, but.  
 17 Q The three letters that we referred to from DNR to  
 18 Flambeau Mining Company which again are Exhibits 19,  
 19 Exhibit 21 and Exhibit 29 --  
 20 MR. SPEERSCHNEIDER: I don't think  
 21 we're that high.  
 22 Q The March 20 letter which is Exhibit 19?  
 23 A Okay.  
 24 Q The September 8 letter which is Exhibit 21?  
 25 A Okay.



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1 Q And the September 23 letter which is Exhibit 23?

2 A Okay.

3 Q These three letters are all letters from the DNR to

4 Flambeau Mining Company stating that stormwater

5 management will fall under the regulatory authority of

6 the mining permit, is that correct?

7 MS. HOEFER: I don't think you have

8 the exhibit numbers right. I think you're

9 referring to Exhibits 20, 21 and 23.

10 MR. SAUL: I think you're right.

11 MR. SPEERSCHNEIDER: Look at the

12 originals, there won't be confusion then.

13 Q So let's try this again. The three letters from DNR

14 which are Exhibits 20, 21 and 23?

15 A Okay.

16 Q Each of those letters state that stormwater management

17 will fall under the regulatory authority of the mining

18 permit, is that correct?

19 A I don't think so. Exhibit 20 clearly does. Exhibit

20 21 --

21 Q Actually I think we need to substitute Exhibit 22 for

22 Exhibit 21.

23 A I think Exhibit 21 does, Exhibit 22 does and Exhibit

24 23 -- again, Exhibit 23 refers to discharges of

25 outfall 002 being covered under the mining permit.

51

1 MS. HOEFER: Objection, outside his

2 expertise. You can answer.

3 A Well, the mining permit doesn't, no.

4 MR. SAUL: He is a 30(b)(6)

5 witness.

6 MS. HOEFER: I understand.

7 Q Does the 1991 mining permit include water quality

8 based effluent limitations under section 301(b)(1)(c)

9 of the Clean Water Act?

10 MS. HOEFER: Objection.

11 A You did specify the mining permit?

12 Q Yes.

13 A No.

14 Q How about the 1998 mining permit modification?

15 A No.

16 Q Was the 1991 mining permit submitted to EPA for review

17 under section 402(d) of the Clean Water Act?

18 A No.

19 Q How about the 1998 mining permit modification?

20 A No.

21 Q Was the 1991 mining permit issued under authority of

22 Wisconsin's EPA approved NPDES permit program?

23 A No.

24 Q How about the 1998 mining permit modification?

25 A No.

50

1 Q One more time for the record, Exhibit 20, 22 and 23

2 all mention that discharges -- excuse me, that

3 stormwater management on the Flambeau mining site

4 would be regulated under the mining permit, correct?

5 A Yes.

6 Q Are there any other documents or letters in the DNR's

7 possession that state that stormwater management from

8 the Flambeau mine site will be managed under the

9 mining permit?

10 A I don't believe so.

11 Q Do any of these three letters themselves authorize a

12 discharge of pollutants to surface waters?

13 A No.

14 Q Do any of these three letters change the substantive

15 terms and conditions of the mining permit?

16 A Was 21 part of it? No.

17 Q And are any of these three letters, again, Exhibits

18 20, 22 and 23 the equivalent of a permit issued under

19 section 402 of the Clean Water Act?

20 MR. SPEERSCHNEIDER: Again, I'll

21 object to form. Go ahead.

22 A No.

23 Q Does the 1991 mining permit include any technology

24 based effluent limitations under section 301(b)(2) of

25 the Clean Water Act?

52

1 Q Is Wisconsin's metallic mining law that was formerly

2 at chapter 144 of the statutes but now is chapter 293,

3 is that statute a part of Wisconsin's EPA approved

4 NPDES permit program?

5 MS. HOEFER: Objection, outside his

6 expertise.

7 A Yeah, I am not familiar with the program.

8 (Exhibit 24 is marked for identification)

9 Q I'm handing you what is Exhibit 24, do you recognize

10 this document?

11 A No.

12 Q I'll represent to you that it's copy of Wisconsin

13 Administrative Code Chapter NR 216 which was

14 promulgated in 1994. In paragraph 20 of your

15 affidavit, you state that the DNR made the decision to

16 regulate stormwater discharges under the mining permit

17 pursuant to NR 216.21(3), is that correct?

18 A Yes.

19 Q Have you read chapter NR 216.21(3) before?

20 A Not lately, but yes, at the time.

21 Q And could you please turn to page WRPC000288 on

22 Exhibit 24?

23 A Yes.

24 Q Can you tell me when the was decision made to regulate

25 stormwater discharges under the mining permit pursuant

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1 to NR 216.21(3)?  
 2 A Can you repeat that?  
 3 Q When was the decision made to regulate stormwater  
 4 discharges from the Flambeau mine site under the  
 5 mining permit pursuant to NR 216.21(3)?  
 6 A That would have been in the spring of 1998.  
 7 Q Do you have an exact date?  
 8 A Well, the letter that was sent to Flambeau Mining  
 9 Company, Exhibit 20, was dated March 20, 1998.  
 10 Q So will you please refer to Exhibit 20, does this  
 11 document mention NR 216.21(3)?  
 12 A No.  
 13 Q Was the determination to regulate stormwater  
 14 discharges from the Flambeau mine site under the  
 15 mining permit pursuant to NR 216.21(3) made available  
 16 for public notice and comment?  
 17 A No.  
 18 Q Was that determination ever subject to administrative  
 19 or judicial review?  
 20 A No.  
 21 Q Did the DNR make a determination pursuant to  
 22 NR 216.21(3) that the 1991 mining permit includes  
 23 stormwater control requirements that are at least as  
 24 stringent as regulations under NR 216, subchapter 2?  
 25 A Yes.

1 determination?  
 2 A Yes.  
 3 Q Was that determination made available to the public  
 4 for review and comment?  
 5 A No.  
 6 Q Were there any public participation opportunities that  
 7 you're aware of regarding that determination?  
 8 A No.  
 9 Q Can you identify for me in the mining permit which  
 10 stormwater control requirements were determined by the  
 11 Department to be at least as stringent as required  
 12 under chapter NR 216, subchapter 2?  
 13 A No.  
 14 Q Do you know who could identify those terms and  
 15 conditions for me?  
 16 A Well, again, I'm sorry, it was --  
 17 Q I'd just ask that you please let me finish speaking  
 18 before you answer.  
 19 A Sorry. It really goes to the entire stormwater  
 20 management plan which we discussed earlier, the  
 21 requirement that they present a plan and that was  
 22 reviewed and approved by the Department. In addition,  
 23 there were provisions of the modification that again  
 24 went to management of stormwater on the site.  
 25 Q So is it your testimony that the mining permit itself

1 Q How was that determination made?  
 2 A It was made with, again, discussions between mining  
 3 staff and wastewater staff.  
 4 Q Is that determination reflected in any document?  
 5 A Other than what's stated in Exhibit 20, no.  
 6 Q And you already confirmed that Exhibit 20 does not  
 7 mention NR 216, correct?  
 8 A That's correct.  
 9 Q Did the DNR at the time compare the stormwater control  
 10 requirements of the mining permit to the stormwater  
 11 control requirements under chapter NR 216?  
 12 A It was my understanding that the wastewater staff did,  
 13 that they evaluated the surface water management plan  
 14 and erosion control plan that we had along with our  
 15 surveillance methods and entire approach to  
 16 surveillance to determine that what we were doing was  
 17 equivalent, if not more stringent, than what they  
 18 could do under 216.  
 19 Q And is that comparison recorded in any document?  
 20 A No.  
 21 Q Does the Department have in its possession any  
 22 documents that reflect the comparison between the  
 23 mining permit and chapter NR 216?  
 24 A No.  
 25 Q Did watershed bureau staff participate in that

1 does not contain storm water control requirements that  
 2 are at least as stringent as those required under  
 3 chapter NR 216?  
 4 A I'm saying there's no specific reference to specific  
 5 stormwater and erosion control measures. There are  
 6 requirements that they have an erosion control plan  
 7 and a stormwater plan or a surface water management  
 8 plan and within those plans, the management practices  
 9 would be equivalent to what you would get under the  
 10 stormwater plan.  
 11 Q You mentioned a surface water control plan and an  
 12 erosion control plan?  
 13 A Yes.  
 14 Q What regulatory authority are those plans developed  
 15 under?  
 16 A They were required, I believe, under the reclamation  
 17 plan approval of the mining permit, I think that's  
 18 part 3 of the mining permit. If I remember, it was  
 19 provision 7 of part 3 that we talked about earlier,  
 20 it's the surface water management plan.  
 21 As part of the mining permit application, an  
 22 applicant was required to submit an erosion control  
 23 plan, so the erosion control plan was actually  
 24 submitted as part of the application. The surface  
 25 water management plan was submitted after permit

1 issuance, but it was also subject to review and  
 2 approval before they could start construction on the  
 3 site.  
 4 Q Was the erosion control plan that's referenced in part  
 5 3, paragraph 7 of the 1991 mining permit required to  
 6 meet any other regulatory standards besides those  
 7 specifically referenced in paragraph 7?  
 8 A I'm not sure I follow your question.  
 9 Q Well, as I read paragraph 7, I see certain  
 10 requirements for the erosion control plan?  
 11 A Those are requirements for the surface water  
 12 management plan which is a supplement to the erosion  
 13 control plan.  
 14 Q So for the surface water management plan, were there  
 15 any other regulatory requirements applicable to it  
 16 besides those identified in paragraph 7?  
 17 A No.  
 18 Q And can you point me to the provision in the mining  
 19 permit that details the standards for the erosion  
 20 control plan?  
 21 A Again, the erosion control plan is required by  
 22 administrative code. It's part of the mining permit  
 23 application.  
 24 Q Do you recall what administrative code that is?  
 25 A It would be NR 132, the actual section citation I

1 plan, not this.  
 2 Q Does the 1991 mining permit require Flambeau Mining  
 3 Company to perform and document quarterly visual  
 4 inspections of the stormwater discharge quality at  
 5 each outfall?  
 6 A The discharge monitoring related to the WPDES permit  
 7 was covered under the WPDES permit. Those were the  
 8 only monitoring activities that were not part of the  
 9 monitoring plan, project monitoring plan.  
 10 Q So the 1991 mining permit does not require Flambeau  
 11 Mining Company to perform and document quarterly  
 12 visual inspections of stormwater discharge quality at  
 13 each outfall, correct?  
 14 A Correct.  
 15 Q How about the 1998 mining permit modification?  
 16 A I don't believe it did.  
 17 Q Does the 1991 mining permit require Flambeau Mining  
 18 Company to maintain annual facility site compliance  
 19 inspection reports on site?  
 20 A Repeat that.  
 21 Q Does the 1991 mining permit require Flambeau Mining  
 22 Company to maintain annual facility site compliance  
 23 inspection reports on site?  
 24 A And I'm assuming that's a specific term related to  
 25 216?

1 don't know.  
 2 Q And NR 132 is a regulation under the metallic mining  
 3 law?  
 4 A Yes.  
 5 Q Does the 1991 mining permit require Flambeau Mining  
 6 Company to submit annual chemical specific monitoring  
 7 results to the DNR?  
 8 A Of anything?  
 9 Q Anything.  
 10 A Yeah, I mean, the mining permit -- it's probably part  
 11 4 of the mining permit, there is a monitoring plan and  
 12 as part of the monitoring plan, there were different  
 13 types of monitoring provisions that were required,  
 14 ground water, surface water, air and as part of that,  
 15 they are required to submit chemical information.  
 16 Q Can you point me to the provision in part 4 of the  
 17 mining permit that addresses annual chemical specific  
 18 monitoring results?  
 19 A It's probably not in the permit itself, but there was  
 20 a plan that was submitted that detailed all the  
 21 monitoring activities and which parameters would be  
 22 covered under the analyses at what frequency, so it  
 23 was approved in the plan. If you want the specific  
 24 provision of, you know, what parameters were being  
 25 analyzed for routinely, you would have to look at the

1 Q Correct.  
 2 A Not specifically, but the company was required to  
 3 conduct annual inspections, various reclamation  
 4 evaluation activities throughout the life of the  
 5 project, but that term was not specifically used.  
 6 Q And which provisions of the 1991 mining permit  
 7 required them to submit annual inspection reports?  
 8 A Part 3, section 26 on page -- you have this labeled as  
 9 Exhibit 16, page 000145, paragraph 26 talks about  
 10 various recording requirements related to reclamation.  
 11 Q And specifically --  
 12 A In addition to -- or no, that is the provision I was  
 13 thinking of.  
 14 Q Specifically which provision are you looking at?  
 15 A Paragraph B, annual report contain a record of  
 16 activities monitoring, raw data and evaluate for a  
 17 permitted mining site.  
 18 Q That's an annual report of reclamation activities,  
 19 correct?  
 20 A No, this is an overall annual report that covers --  
 21 includes all of the monitoring information as well.  
 22 The provision in -- I'm sorry, that is the reclamation  
 23 report. There must be another -- there is another  
 24 provision regarding a general annual report.  
 25 (Witness examines document)

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1 MR. SAUL: We'll note for the  
2 record that counsel for Flambeau Mining Company  
3 referred the witness to a provision in the mining  
4 permit.  
5 A The annual report is actually indicated on page 121 of  
6 that exhibit. An annual report is required by  
7 statute, at the time it was 144.89, paragraph 4 of  
8 part 2 of the mining permit indicates -- specifies  
9 certain information that has to be included in the  
10 annual report.  
11 Q And looking to part 2, paragraph 4 on page WRPC000121  
12 of Exhibit 16, that states the annual report required  
13 under section 144.89 of the statutes, correct?  
14 A Yes.  
15 Q Is that the same as the annual facility site  
16 compliance inspection report required under chapter  
17 NR 216?  
18 A I'm not familiar with what those reports usually  
19 include.  
20 Q Who would be familiar with that?  
21 A Somebody in the watershed program who works with  
22 stormwater specifically.  
23 Q When the Department determined that the requirements  
24 of the 1991 mining permit included stormwater control  
25 provisions at least as stringent as under NR 216, did

1 discharge off of the site, you know, was -- I mean,  
2 not treated, per se, but the idea of a biofilter is to  
3 remove sediment. Mainly, we were concerned with  
4 sediment removal.  
5 Q But can you answer the question specifically?  
6 A Can you repeat it?  
7 Q Does the 1991 mining permit require Flambeau Mining  
8 Company to prescribe appropriate stormwater treatment  
9 practices as needed to reduce the pollutants in  
10 contaminated stormwater prior to discharge to waters  
11 of the state?  
12 A Again, I'm not familiar with what treatment  
13 specifically is referring to in that context.  
14 Q But you're familiar with the 1991 mining permit?  
15 A Yes.  
16 Q Is there a provision like the one I just read in the  
17 1991 mining permit?  
18 A In the permit, no, but the -- I mean, the best  
19 management practices that are part of the surface  
20 water management plan and the follow-up modification,  
21 you know, again, the goal was to address  
22 sedimentation. Whether or not that constitutes  
23 treatment, is what I'm saying, I don't know.  
24 Q Who would be able to answer that?  
25 A Somebody in our watershed program.

1 the Department compare the requirements for annual  
2 reports under chapter 144.89 of the statutes to the  
3 requirement to prepare an annual facility site  
4 compliant inspection report under chapter NR 216?  
5 A I don't recall specific comparison being made.  
6 Q Does the 1991 mining permit require Flambeau Mining  
7 Company to develop a stormwater pollution prevention  
8 plan or SWPPP?  
9 A No.  
10 Q Does the 1998 mining permit modification require that?  
11 A Again, I don't know what a -- what did you call it?  
12 Q SWPPP is the lingo.  
13 A I don't know what they would require, so I don't know  
14 if the modification and the stormwater management  
15 plan -- if it would be equivalent or not.  
16 Q Who would know that?  
17 A Somebody in the stormwater program or the water  
18 resources program.  
19 Q Did the 1991 mining permit require Flambeau Mining  
20 Company to prescribe appropriate stormwater treatment  
21 practices as needed to reduce the pollutants and  
22 contaminated stormwater prior to discharge to waters  
23 of the state?  
24 A I mean, the whole goal of the surface water management  
25 plan that we implemented was to insure that any

1 Q What about the 1998 mining permit modification?  
2 A That's what I was just referring to as well.  
3 Q Does the 1991 mining permit require Flambeau Mining  
4 Company to comply with the monitoring requirements  
5 contained in NR 216.28?  
6 A No.  
7 Q Does the 1998 mining permit modification require that?  
8 A Actually, I should say I'm not sure what the 216  
9 monitoring requirements are to begin with, but they  
10 don't specifically refer to 216.  
11 Q In paragraph 30 of your affidavit, Exhibit 15?  
12 A Okay.  
13 Q In paragraph 30 of your affidavit, you state that with  
14 regard to stormwater discharges, Flambeau has remained  
15 in compliance with the mining permit and the  
16 modification during your period of oversight which  
17 ended in 2006, correct?  
18 A Yes.  
19 Q Which mining permit and modification provisions are in  
20 regard to stormwater discharges as you use it in that  
21 paragraph?  
22 A Again, it relates to the surface water management plan  
23 and various measures that would be taken under the  
24 surface water management plan and the erosion control  
25 plan of the original approval or around the time of



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1 the original approval and also the site grading plan  
2 and water management plan approved as part of the  
3 modification.  
4 Q You testified earlier that neither the 1991 mining  
5 permit nor the '98 mining permit modification  
6 authorized stormwater discharges, is that correct?  
7 A Correct.  
8 Q You also state that Flambeau is in compliance with the  
9 stormwater discharge requirements in the mining  
10 permit, how is that compliance determined?  
11 A Again, it was whether or not they complied with the  
12 surface water management plan and erosion control plan  
13 and the provisions that were delineated in those  
14 plans.  
15 Q Does the Department have a process for determining  
16 compliance or non compliance with those plans?  
17 A Primarily, it was based on site inspections and  
18 evaluation by staff in our program.  
19 Q And when was the last time that the Department had a  
20 site inspection of the Flambeau mine site?  
21 A I don't know, I'm not in the program anymore.  
22 Q Do you know who would know that?  
23 A Phil Fauble.  
24 Q Are you aware of any compliance records in DNR's  
25 possession that specifically address Flambeau Mining

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1 Q So to your knowledge, the Department has never  
2 conducted an inspection of Flambeau Mining Company's  
3 property to determine if the company was in compliance  
4 with NR 216?  
5 A Yes.  
6 (Exhibit 25 is marked for identification)  
7 Q So this is what we've marked as Exhibit 25, have you  
8 seen this exhibit before?  
9 A I have not.  
10 Q I'll tell you that this is 40 CFR section 123.62  
11 relating to procedures for revision of state programs  
12 under the NPDES permit program. Was NR 216.21(3) ever  
13 submitted to EPA for review and approval as a  
14 modification to Wisconsin's approved NPDES program  
15 pursuant to 40 CFR 123.62?  
16 MS. HOEFER: Objection, outside the  
17 scope of his expertise.  
18 A I have no idea.  
19 Q Was Wisconsin statute 283.33 ever submitted to EPA for  
20 review and approval under this CFR cite?  
21 MS. HOEFER: Objection, outside the  
22 scope of his expertise.  
23 Q Did EPA ever approve NR 216.21(3) as a modification to  
24 the WPDES permit program?  
25 MS. HOEFER: Same objection, he can

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1 Company's compliance with the stormwater discharge  
2 requirements in the mining permit, if any?  
3 A Not that directly relate to it.  
4 Q Are there some that indirectly relate to it?  
5 A In the context of issuing what's called a certificate  
6 of completion for reclamation, implicit in that is  
7 whether or not they've complied with the reclamation  
8 plan and the reclamation plan again includes measures  
9 related to erosion control and surface water  
10 management.  
11 Q And it's my understanding that a certificate of  
12 completion has not been issued for the industrial  
13 outlot, is that correct?  
14 A Again, it hadn't been issued at the time I left the  
15 program. I don't know if it has since.  
16 Q And who --  
17 A Phil Fauble.  
18 Q Has the Department ever conducted an inspection of  
19 Flambeau Mining Company's property to determine if  
20 Flambeau Mining Company was in compliance with NR 216?  
21 A I didn't.  
22 Q Do you know if anyone at the Department did?  
23 A Again, you would have to check with people in the  
24 wastewater or stormwater program who actually have  
25 that authority.

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1 answer.  
2 A I don't know, I wasn't involved in that program.  
3 Q And has the EPA ever approved Wisconsin's use of a  
4 mining permit in lieu of a WPDES permit to authorize  
5 and regulate discharges of pollutants to surface  
6 water?  
7 MS. HOEFER: Objection, outside the  
8 scope of his expertise.  
9 A I don't know.  
10 MR. SAUL: Let's go off the  
11 record.  
12 (A short recess is taken)  
13 Q Do you have any other duties or responsibilities with  
14 regard to Flambeau Mining Company's property that are  
15 not specifically mentioned in your affidavit?  
16 A Do I now? I don't have any responsibilities regarding  
17 Flambeau.  
18 Q At the time, did you?  
19 A No.  
20 Q So your affidavit is a complete summary of your  
21 responsibilities on behalf of the Department with  
22 regard to the Flambeau mine site?  
23 A Let me check.  
24 (Witness examines document)  
25 A Yes.

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1 Q In paragraph 7 of your affidavit, you state that you  
2 were DNR's point person on the mine from 1991 through  
3 2006, correct?  
4 A Yes.  
5 Q Were you copied on WPDES permit related correspondence  
6 within the DNR?  
7 A I should have been.  
8 Q But do you know if you were or were not?  
9 A I received some, I -- again, I'm assuming I received  
10 all, but I can't say that for sure without knowing,  
11 you know, what their file includes, whether or not it  
12 was in my file.  
13 Q Were you copied on correspondence within the DNR  
14 related to stormwater discharges from the Flambeau  
15 mine site?  
16 A Yes.  
17 Q How did your affidavit come into existence, who asked  
18 you to draft this affidavit?  
19 MR. SPEERSCHNEIDER: I'm going to  
20 object and I'm going to ask that counsel for the  
21 Department object based upon attorney-client  
22 privilege. I mean, the affidavit was done  
23 pursuant to a joint defense agreement based upon  
24 the original notice of intent to sue, which I have  
25 a copy of, which has never been withdrawn where

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1 case.  
2 Q Did you review prior drafts of your affidavit before  
3 finalizing what is Exhibit 15?  
4 A Yes.  
5 Q Do you still have copies of prior drafts of your  
6 affidavit?  
7 A I do not.  
8 Q Do you know if anyone at the Department has copies of  
9 your prior drafts of your affidavit?  
10 A I do not.  
11 MS. HOEFER: Objection, I would  
12 object to producing those based upon  
13 attorney-client privilege.  
14 Q Did you have any discussions with counsel for Flambeau  
15 Mining Company outside the presence of attorneys  
16 working for the Department of Natural Resources?  
17 A I don't think so, I mean, we did have one meeting  
18 where our staff attorney may have left the room, but  
19 we also had at the same time an attorney from the  
20 Department of Justice there.  
21 Q Can you identify for me who was in the room at that  
22 meeting?  
23 A Tom Dawson.  
24 Q Was anyone else in the room?  
25 A Other than the Flambeau attorneys? No, it was me, Tom

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1 the Department was identified as a defendant in  
2 the matter. I've done what I can do.  
3 MS. HOEFER: The Department is not  
4 going to object. He's not asking what the  
5 conversations were, he was asking who was  
6 involved.  
7 MR. SAUL: Are you providing a copy  
8 of the joint defense agreement?  
9 MR. SPEERSCHNEIDER: The joint  
10 defense agreement is oral.  
11 Q Has the joint defense agreement been reduced to  
12 writing in any way?  
13 MS. HOEFER: I am --  
14 MR. SPEERSCHNEIDER: I'm not under  
15 oath, not that I am aware of.  
16 MR. SAUL: I'm asking the witness.  
17 A I don't even -- I'm not aware of it.  
18 MS. HOEFER: Objection, he's not  
19 qualified to answer that.  
20 MR. SAUL: There's a question  
21 pending, could you read it back?  
22 (Reporter reads back previous question)  
23 A I think as we discussed earlier, I was requested by  
24 one of our staff attorneys to participate in a  
25 discussion about the affidavit related to the pending

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1 Dawson, Dan Graff and I believe Mr. Speerschneider.  
2 Q What was the purpose of that meeting?  
3 A We were discussing my historical involvement with  
4 Flambeau and the issues that are addressed in the  
5 affidavit.  
6 Q What's the date of that meeting?  
7 A I don't know.  
8 Q Can you give me an approximation?  
9 A Spring of this year.  
10 Q Spring of 2011?  
11 A 2011, yes.  
12 Q Was it in March of 2011?  
13 A I don't know, I'd have to check, but that sounds about  
14 right. This was dated in April, so late March, April,  
15 sometime in that range.  
16 Q And did you take any handwritten notes at that  
17 meeting?  
18 A No.  
19 Q Did anyone else take any written notes at that  
20 meeting?  
21 A I don't know.  
22 Q Were there any decisions made as a result of that  
23 meeting?  
24 MR. SPEERSCHNEIDER: I'm going to  
25 object and to the extent that I can object, I

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1 believe he is going into the attorney-client  
2 privilege at this point in time when he's asking  
3 about decisions.  
4 MS. HOEFER: I think you can answer  
5 whether or not there were any decisions, don't  
6 answer what the decisions were.  
7 A Again, I'm not sure what would be a decision, I mean,  
8 we did talk about what my involvement was, we didn't  
9 talk much beyond that. Again, that's all reflected in  
10 the affidavit.  
11 Q Did you decide to prepare and sign this affidavit as a  
12 result of that meeting?  
13 A That was part of the process, yes, we talked about  
14 what the affidavit would address, yes.  
15 Q And who at that meeting asked you to prepare the  
16 affidavit?  
17 MR. SPEERSCHNEIDER: Again, I'm  
18 going to object. I mean, we're getting into  
19 attorney-client communications. The Department  
20 has asserted an attorney-client privilege and I  
21 think any communications that occurred during that  
22 meeting are privileged.  
23 MS. HOEFER: The Department agrees  
24 and objects to attorney-client privilege, so I'd  
25 direct you not to answer regarding the

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1 A Well, whoever works in our stormwater program. I'm  
2 not sure what staff are currently in charge of that  
3 these days.  
4 Q So when the 1998 mining permit modification was  
5 granted, was the Department aware that the discharge  
6 from the biofilter would contain copper and zinc?  
7 A No.  
8 Q When did the Department become aware that the  
9 discharge from the biofilter contained copper and  
10 zinc?  
11 A There was monitoring conducted in 1999, 2000, in that  
12 range. The company was establishing baseline  
13 conditions in all the reconstructed wetlands and as a  
14 result of that monitoring, it was -- we saw high  
15 copper in the biofilter, so they had continued  
16 sampling.  
17 Q So 1999 at the earliest would have been the first  
18 instance that the Department became aware that the  
19 discharge from the .9 acre biofilter contained copper  
20 and zinc?  
21 A I don't think they were sampling discharge, I think  
22 they were sampling the water in the biofilter.  
23 Q Was there an actual discharge occurring in 1999 from  
24 the biofilter to Stream C?  
25 A I assume so, during high water periods.

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1 communications between the attorneys and you.  
2 Q You mentioned earlier in your deposition, if I can  
3 recall it correctly, that at the time the 1998 mining  
4 permit modification was approved, it was the  
5 Department's belief that any discharge from the .9  
6 acre biofilter would be clean discharge?  
7 A Yes.  
8 Q Is that correct?  
9 A Yes, that was our operating assumption, was that it  
10 was a reclaimed part of the mining site covered  
11 essentially by topsoil and then revegetated.  
12 Q What do you mean by clean discharge?  
13 A In the context of clean or non contact surface water  
14 runoff.  
15 Q So do you mean -- does clean mean --  
16 A Not contacting waste material.  
17 Q Does clean mean not containing pollutants?  
18 A Generally, yes.  
19 Q Is it the Department's position that a, quote, "Clean  
20 discharge of stormwater," would require a WPDES  
21 permit?  
22 A I don't know what would be -- again, that's part of  
23 the stormwater program, not the mining program.  
24 Q And who at the Department specifically would know  
25 that?

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1 Q But you don't know for sure?  
2 A I mean, just thinking about the design of the  
3 facility, I mean, it was intended to filter sediment  
4 and discharge, so again, unless it was a really severe  
5 drought, I'm sure it was discharging.  
6 Q So prior to 1999, was the Department aware that the  
7 discharge from the biofilter to Stream C contained any  
8 pollutants?  
9 A No.  
10 Q Can you tell me again everything that was discussed in  
11 your spring 2011 meeting with counsel for DNR?  
12 MS. HOEFER: Objection,  
13 attorney-client privilege.  
14 Q And were there any other meetings or any telephone  
15 calls regarding preparation of your affidavit aside  
16 from the one you referred to that occurred in spring  
17 of 2011?  
18 A I think we had two meetings, again, in that -- within  
19 that same rough time period.  
20 Q A total of two meetings?  
21 A Yes, that's what I recall.  
22 Q So at the other meeting, who was present?  
23 A Our staff attorney, Dan Graff and attorneys from  
24 Flambeau.  
25 Q Specifically who from Flambeau was present?

## Deposition of LAWRENCE J. LYNCH

7/29/11

1 A There was one meeting where Mr. Speerschneider and  
 2 Attorney Hank Handzel was also present. I don't  
 3 recall if Hank was present at the other meeting or  
 4 not.  
 5 Q Was anyone else present at that meeting?  
 6 A No.  
 7 Q Was that before or after the meeting you referred to  
 8 earlier?  
 9 A I think the first meeting was the one that Tom Dawson  
 10 was in attendance, so I think the one with Tom Dawson  
 11 would have been the second meeting. That's to my  
 12 memory.  
 13 Q Again, you don't know the precise date of either of  
 14 those meetings?  
 15 A No, not offhand.  
 16 Q Were any notes taken at the other meeting that would  
 17 have been the first meeting?  
 18 A By me?  
 19 Q By you.  
 20 A No.  
 21 Q Any notes taken by anyone present?  
 22 A I don't know if they did or did not.  
 23 Q Were any decisions made at that first meeting?  
 24 A Again, we talked about, you know, what my involvement  
 25 was.

1 A No.  
 2 MR. SAUL: Thank you.  
 3 (11:50 a.m.)  
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1 Q What your involvement was in --  
 2 A In regard to regulation of the Flambeau mine and how  
 3 that would be reflected in an affidavit.  
 4 Q Were any decisions made at that first meeting?  
 5 MS. HOEFER: Objection, asked and  
 6 answered.  
 7 Q What else was discussed at that first meeting?  
 8 A That was --  
 9 MS. HOEFER: Objection,  
 10 attorney-client privilege.  
 11 MR. SAUL: You're instructing him  
 12 not to answer?  
 13 MS. HOEFER: I'm directing you not  
 14 to answer.  
 15 MR. SAUL: I think we can go off  
 16 the record.  
 17 (A short recess is taken)  
 18 (Exhibit 26 is marked for identification)  
 19 Q I'll just ask you for the record, that what we've  
 20 marked as Exhibit 26 are those documents that you  
 21 brought with you to the deposition today?  
 22 A Yes, they are.  
 23 Q Are there any other documents that you brought with  
 24 you today that are not included as part of Exhibit  
 25 26?

1 STATE OF WISCONSIN COUNTY OF DANE  
 2 I, NANCY L. DELANEY, a Notary Public commissioned  
 3 and qualified in and for the State of Wisconsin, do  
 4 hereby certify that there came before me on July 29,  
 5 2011, at the offices of McGillivray, Westerberg & Bender,  
 6 LLC, 211 South Paterson Street, Madison, Wisconsin, the  
 7 following named person, to wit: LAWRENCE J. LYNCH, who  
 8 was by me duly sworn to testify to the truth and nothing  
 9 but the truth of knowledge touching and concerning the  
 10 matters in controversy in this cause; that the witness  
 11 was thereupon carefully examined under oath; that said  
 12 examination was taken in shorthand by me and reduced to  
 13 writing using computer-aided transcription; that said  
 14 deposition is a true record of the testimony given by the  
 15 witness; that the witness has not waived reading and  
 16 signing. I further certify that I am neither attorney or  
 17 counsel for, nor related to or employed by, any of the  
 18 parties to the action in which this deposition is taken,  
 19 and further that I am not a relative or employee of any  
 20 attorney or counsel employed by the parties or  
 21 financially interested in the action.  
 22 In witness whereof I have hereunto set my hand and  
 23 affixed my notarial seal July 30, 2011.  
 24 My commission expires March 11, 2012  
 25



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